Tan Kim Hor & Ors v Tan Heng Chew & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–54 OF 2006
MOHD GHAZALI, MOKHTAR SIDIN AND TENGKU BAHARUDIN SHAH JJCA
7 NOVEMBER 2008

Companies and Corporations — Just and equitable grounds — Winding up petition sought on just and equitable grounds — Whether petition ought to be summarily dismissed — Companies Act 1965 s 218(1)(i)

Companies and Corporations — Winding up — Petition — Whether trial judge erred in law and in fact in striking out petition summarily — Just and equitable grounds — Whether full hearing of petition required — Companies Act 1965 s 218(1)(i)

The petitioners/appellants filed a winding up petition against the ninth respondent ('the company') on the 'just and equitable' ground under s 218(1)(i) of the Companies Act 1965 ('the Act'). The appellants and respondents were all members of the Tan Chong family and embroiled in a protracted family feud. The petition could not be heard due to numerous interlocutory applications filed by the parties and the appeals from those applications. The respondents had filed their first application to strike out the petition some four months after the petitioners had filed the petition. Though the application was allowed at first instance, the Court of Appeal had set aside the order on, inter alia, the basis that the High Court had prematurely made several conclusions at an interlocutory stage. The respondents subsequently filed a second application to strike out the petition on the grounds that the petitioners had failed to file the affidavit verifying petition. The petitioners then filed an application for extension of time to file the affidavit verifying the petition. Both these applications were eventually dismissed with costs by the High Court. However, after filing their second application, the respondents proceeded to file a third application to strike out the petition. This third application was premised on the basis, inter alia, that the petitioners' position was inconsistent. The respondents pointed out that in the petition, the petitioners had claimed the company to be a '50:50% or equal quasi partnership' but in a related civil suit, the first petitioner had in a counterclaim averred that the petitioners owned 55.4% of the shares in the company and had sought rectification of the shares register accordingly. The

A High Court allowed this third application and the petitioners thus appealed to the Court of Appeal.

B **Held**, allowing the appeal with costs:

(1) The averments made in a winding up petition under s 218(1)(i) of the Act have to be investigated fully by the court. This can only be done during the hearing of the petition. The words 'just and equitable' appearing in s 218(1)(i) encompass a very wide concept. The court should not summarily strike out a petition based on that subsection without conducting a full hearing. A judge, based upon affidavits filed in a motion to strike out such a petition and averments made in pleadings filed in a related writ action and involving the same parties, should not strike out the petition simply because he is of the view that the petitioner has an alternative remedy. The judge, in such an application, should consider whether the just and equitable principle was sustainable based on averments found in the petition (see paras 52 & 59).

(2) In the instant case, the judge had failed to appreciate the true nature of the company and the just and equitable principle in striking out the petition without hearing it on the merits. Whilst, the 'just and equitable principle' under s 218(1)(i) of the Act does not entitle a party to disregard the obligations which he assumed by entering a company, it enables the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way (see para 60). *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 followed.

(3) In the instant case, the High Court was wrong in summarily striking out the petition, which was for the second time. The application to strike out was clearly an abuse of the process of the court. This was clearly not a plain and obvious case warranting striking out. An application to strike out a petition presented under s 218(1)(i) of the Act is undesirable and should be discouraged as it would only delay adjudication of the matter. The High Court had failed to appreciate the true nature of the company and the just and equitable principle on the facts of the Tan Chong family business. The petition was clearly sustainable and triable. The main issue at the hearing of the petition would be whether there were adequate grounds to order a winding up of the company based on the just and equitable ground and on a mutual breakdown in trust and confidence between the petitioners and the respondents as members of the Tan Chong family, based upon the

facts pleaded in the petition (see para 63). *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492 followed.

(4) The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power and it should be exercised with the utmost caution (see para 63). *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347 followed.

(5) The third striking out application was clearly an abuse of the court's process. The High Court seriously erred in hearing and allowing the third application in that the High Court failed to appreciate that the just and equitable principle could only be considered at a full hearing of the petition. A judge hearing a petition such as in the instant case had to find whether there had been a breakdown of mutual trust and confidence between the parties in what was essentially a quasi partnership and consequently decide whether there were just and equitable grounds to wind up the company. On the facts, the judge was clearly wrong in making the findings, conclusions and inferences that he did at the interlocutory stage (see para 64). *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 referred.

[Bahasa Malaysia summary

Pempetisyen-pempetisyen/perayu-perayu memfailkan petisyen penggulungan terhadap responden kesembilan ('syarikat') atas dasar 'just and equitable' di bawah s 218(1)(i) Akta Syarikat 1965 ('Akta'). Perayu-perayu dan responden-responden merupakan ahli keluarga Tan Chong dan telah lama bermusuh. Petisyen tidak boleh didengar disebabkan banyak permohonan interlokutori difailkan oleh pihak tersebut dan rayuan-rayuan daripada permohonan tersebut. Responden-responden telah memfailkan permohonan pertama mereka untuk membatalkan petisyen empat bulan selepas pempetisyen-pempetisyen memfailkan petisyen tersebut. Walaupun permohonan itu dibenarkan pada mulanya, Mahkamah Rayuan telah membatalkan perintah atas dasar bahawa Mahkamah Tinggi telah membuat beberapa keputusan pramatang pada peringkat interlokutori. Responden-responden seterusnya memfailkan permohonan kedua untuk membatalkan petisyen atas dasar bahawa pempetisyen-pempetisyen telah gagal untuk memfailkan afidavit mengesahkan petisyen. Pempetisyen-pempetisyen kemudiannya memfailkan permohonan melanjutkan masa untuk memfailkan afidavit mengesahkan petisyen. Kedua-dua permohonan ini akhirnya ditolak dengan kos oleh Mahkamah Tinggi. Walau bagaimanapun, selepas memfailkan permohonan kedua mereka, responden-responden meneruskan untuk memfailkan permohonan ketiga untuk membatalkan petisyen. Permohonan ketiga bersandar kepada

kedudukan pempetisyen-pempetisyen yang tidak konsisten. Responden-responden menyatakan dalam petisyen, pempetisyen-pempetisyen menuntut syarikat menjadi '50:50% or equal quasi partnership' tetapi dalam guaman sivil berkaitan, pempetisyen pertama telah menegaskan dalam tuntutan balas bahawa pempetisyen-pempetisyen memiliki 55.4% saham-saham syarikat dan dengan itu menuntut pembetulan daftar saham. Mahkamah Tinggi membenarkan permohonan ketiga ini dan pempetisyen-pempetisyen kemudiannya merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Penegasan yang dibuat dalam petisyen penggulungan di bawah s 218(1)(i) Akta perlu disiasat sepenuhnya oleh mahkamah. Ini hanya boleh dijalankan semasa perbicaraan petisyen. Perkataan 'just and equitable' dalam s 218(1)(i) merangkumi konsep yang sangat luas. Mahkamah tidak seharusnya membatalkan petisyen berdasarkan subseksyen tersebut tanpa mengadakan perbicaraan penuh. Hakim, berdasarkan afidavit yang difailkan di dalam usul untuk membatalkan petisyen tersebut dan penegasan yang dibuat dalam pliding yang difailkan berkenaan tindakan writ dan melibatkan pihak-pihak yang sama, tidak seharusnya membatalkan petisyen hanya kerana beliau berpendapat bahawa pempetisyen mempunyai remedi alternatif. Hakim seharusnya mempertimbangkan sama ada prinsip adil dan saksama dapat dikekalkan berdasarkan penegasan yang ditemui dalam petisyen (lihat perenggan 52 & 59).

(2) Dalam kes ini, hakim telah gagal untuk menghayati ciri-ciri syarikat dan prinsip adil dan saksama dalam membatalkan petisyen tanpa mendengar berdasarkan merit. Sementara itu, 'just and equitable principle' di bawah s 218(1)(i) Akta tidak melayakkan pihak tersebut untuk tidak mengendahkan kewajipannya tatkala dia memasuki syarikat, ia membolehkan mahkamah untuk melaksanakan hak undang-undang terhadap pertimbangan saksama yang bersifat persendirian, yang timbul antara individu-individu yang mungkin menjadikannya tak saksama untuk meneruskan hak undang-undang atau melaksanakannya dalam cara tertentu (lihat perenggan 60). *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 diikut.

(3) Dalam kes ini, Mahkamah Tinggi telah silap dalam membuat keputusan membatalkan terus petisyen tersebut, untuk kedua kalinya. Permohonan membatalkan jelas merupakan penyalahgunaan proses mahkamah. Ini dengan jelas bukan merupakan kes yang mewajarkan pembatalan. Permohonan untuk membatalkan petisyen yang ditunjukkan di bawah s 218(1)(i) Akta tidak digalakkan

memandangkan ia hanya akan melambatkan penghukuman perkara tersebut. Mahkamah Tinggi telah gagal untuk menghayati ciri-ciri syarikat dan prinsip adil dan saksama perniagaan keluarga Tan Chong. Petisyen tersebut jelas boleh diterima dan dibicarakan. Isu utama pada perbicaraan petisyen adalah sama ada terdapat alasan-alasan mencukupi untuk memerintahkan penggulungan syarikat berdasarkan prinsip adil dan saksama dan kehilangan kepercayaan dan keyakinan antara pempetisyen-pempetisyen dan responden-responden sebagai ahli keluarga Tan Chong, bersandarkan fakta-fakta yang diakui dalam petisyen (lihat perenggan 63). *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492 diikut.

(4) Kuasa sedia ada untuk menolak tindakan terus tanpa membenarkan plaintif untuk meneruskan perbicaraan merupakan kuasa yang drastik dan perlu digunakan dengan cermat (lihat perenggan 63). *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347 diikut.

(5) Permohonan pembatalan ketiga jelas menunjukkan penyalahgunaan proses mahkamah. Mahkamah Tinggi membuat kesilapan serius dalam perbicaraan dan dengan membenarkan permohonan ketiga, Mahkamah Tinggi telah gagal untuk menghayati prinsip adil dan saksama yang seharusnya dipertimbangkan pada petisyen perbicaraan penuh. Hakim yang mendengar perbicaraan perlu mencari sama ada wujud hilang kepercayaan dan keyakinan antara semua pihak yang mana adalah penting dalam kuasi perkongsian dan dengan itu membuat keputusan sama ada terdapat sebab yang adil dan saksama untuk melakukan penggulungan syarikat. Berdasarkan fakta-fakta, jelaslah bahawa hakim telah silap dalam membuat dapatan, keputusan dan inferens yang dibuat pada peringkat awal (lihat perenggan 64). *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 dirujuk.]

Notes

For cases on petition of winding up, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

For cases on winding up petition sought on just and equitable grounds, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1166–1171.

Cases referred to

CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 MLJ 347, FC (folld)

Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360, HL (folld)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 AMR 2893, CA (refd)

Tan Kim Hor & Ors v Tan Heng Chew & Ors [2002] 2 MLJ 216, HC (refd)

A *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492, CA (folld)
Tan Kim Hor & Ors v Tang Heng Chew & Ors [2006] 2 MLJ 324, HC (refd)
Yenidje Tobacco Co Ltd, Re [1916] 2 Ch 426, CA (folld)

Legislation referred to

B Companies Act 1948 [UK] ss 184, 210, 222(f)
Companies Act 1965 ss 158, 158(4) 171(3), 218, 218(1)(i), 221(2)(e)
Companies (Winding Up) Rules 1972

Cecil Abraham (Yei Kei Kan and Sunil Abraham with him) (Shearn Delamore & Co) for the appellants.

C *Low Khian Leong (Low Chi Cheng, Tan Sin Shih and Kho Yiong San with him) (Lim Kian Leong & Co) for the respondents.*

Mohd Ghazali JCA (delivering judgment of the court):

D

[1] The petitioners (the appellants in this appeal) presented a winding up petition on 21 May 2001 to wind up Tan Chong Consolidated Sdn Bhd (the ninth respondent in the petition and the ninth respondent in this appeal and hereafter referred to as 'the company') on the 'just and equitable' ground, ie
E s 218(1)(i) of the Companies Act 1965 ('the Act'). Both parties are members of the Tan Chong family and are embroiled in a protracted family feud. We will hereafter refer to the parties as they were in the petition.

[2] The petition has yet to be heard by the High Court due to a flurry of
F interlocutory applications filed by the parties and appeals to this court that followed as a consequence of those applications.

[3] The appeal before us relates to encl 163, viz, an application by the
G respondents to strike out the petition. The application was granted by Zulkefli Ahmad Makinudin J (as he then was) and hence, this appeal. It would be appropriate to mention at the outset that this was the respondents' third application to strike out the petition.

H **[4]** We had in an unanimous decision on 5 October 2006 allowed the appeal with costs and ordered that the petition be remitted to the High Court for an early trial.

[5] Our reasons for allowing the appeal follows.

I

THE PETITION

[6] The first petitioner is Tan Kim Hor and the second to the eighth petitioners are his sons whilst the ninth and tenth petitioners are the first

petitioner's second and third wives respectively. The petitioners are shareholders of the company and hold a total of 8,849,308 shares in the company which constitute approximately 44.6% of the total issued shares.

[7] The first to the seventh respondents are the sons of the late Tang Yuet Foh ('the late TYF') who died on 8 October 1985 and the eighth respondent is the third wife of the late TYF. The first petitioner and the late TYF are the sons of Tan Chong, deceased and the first respondent is the eldest son of the late TYF. The first petitioner is the co-founder of the company and the Tan Chong group. He is 83 years old. The first to the eighth respondents are also shareholders of the company and hold a total of 10,999,807 shares in the company which constitute approximately 55.4% of the total issued shares.

[8] At the date of the filing of the petition the first to the fourth petitioners and the first to the fourth respondents and the seventh respondent are directors of the company.

[9] The company was incorporated on 7 June 1973 and the first subscribers and directors were the first petitioner and the late TYF. The authorised capital of the company is RM80m divided into 80m shares of RM1 each of which 19,849,115 ordinary shares are issued and paid up or credited as paid up. The company is the assets holding vehicle for members of the Tan Chong family and it was incorporated solely for the purpose of allowing the Tan Chong family to hold a controlling block of shares in a public listed company called Tan Chong Motors Holdings Bhd ('TCMH').

[10] According to the petition, consistent with the equal manner in which the late TYF and the first petitioner have always owned and run the business, the company was incorporated with the first petitioner's family and TYF's family each holding a 50%–50% stake in the company. However, a few months prior to the listing of TCMH, which was listed on the local bourse on 4 February 1974, the late TYF sought from the first petitioner 500,000 shares which represented approximately 5% of the latter's stake in the company with a promise of consideration when he has funds at a future date. The late TYF had explained that being the chairman of TCMH, he must be seen by the public to at least have a greater shareholding in the business and that it was strictly 'for image purposes'. It was stated in the petition that the first petitioner was disturbed by the late TYF's requests 'as it was always been clear to us that the business would be held equally between us on a 50%/50% basis' and 'the persistent requests continued for a period of two months'. In relation to this, paras 53, 54 and 54 of the petition reads:

> 53 The persistent requests of TYF had started to cause me anxiety. To persuade me to agree, TYF assured that the conferring of a majority stake in the company by virtue of the transfer of my 5% stake in the company to him would not in any way

affect our mutual and longstanding understanding that we would always deal with each other in good faith and that we would each continue to have equal say in the running of the business. The 5% transfer would only confer on TYF 5% more of any dividends, and not any other rights attached to those shares. It was only on this basis that I agreed to the transfer and in fact, true to my brother's word, TYF never in his lifetime broke faith with me and I was never made to feel threatened in any way or uncomfortable with my position as minority shareholder.

54. Although TYF passed away in 1985, to date I have yet to be paid for my shares.

55. TCMH was listed on the KLSE on 4 February 1974 with the company holding 51.28% of the total issued share capital of TCMH.

Paragraph 58 of the petition reads:

58 Notwithstanding the corporate set-up of TCMH, TYF and I continued to mutually discuss all issues relating to the affairs of the TCMH group. The mutual trust and confidence, which governed our relationship, was not marred by TYF's demand for an extra 5% stake in the company. In fact, after the listing of TCMH, to ensure that the Tan Chong family would always remain in control of TCMH, TYF and I ran the business together on even more closely-knit lines.

[11] The late TYF passed away on 8 October 1985 and upon his demise the first respondent, TYF's son took over the late TYF's role and became the head of the late TYF's family. However, according to the petition, from late 1997 onwards the first and or second respondent made several major decisions relating to the business without the prior knowledge and approval of the first petitioner. In relation to this, para 103 of the petition reads:

103 I then realised that THC [ie, the first respondent] was determined to disregard my views and his promises of keeping to the spirit of our family's consultative style of management rang hollow. The possibility of the business breaking up in the future in light of THC's recent behavior became real. For the first time since I gave my 5% stake in the company to TYF, I started to worry about my family's possible position as 'minority' shareholders in the company and the fact that I am now in the twilight of my life and should resolve this matter soon. I was advised by my solicitors that one way I could protect my family's possible position as 'minority' shareholders in the company would be to procure a winding up of the company and by so doing allow the two families to hold shares directly in TCMH in their own respective capacities. In this way, my family's shareholdings would not be locked-in within the company and we would not be placed in a vulnerable position of minority shareholders.

[12] Subsequently, the first petitioner put forward his proposal 'for the restructuring of the family's shareholding in the business' but the first respondent was against that proposal. After that, things were not too rosy between the petitioners and the respondents. At an extraordinary general meeting ('EGM') of the company held on 11 September 1999, the

respondents, being the majority shareholders managed to pass several disputed resolutions. The actions of the first respondent subsequent to the EGM, according to the petition, showed that he 'was not interested in any mutual participation by our two families in the running of the business and only wanted full control of the Tan Chong empire and that the mutual trust and confidence which had subsisted among the two families in the business for more than 40 years had broken down irretrievably'.

[13] The petitioners then filed this petition to wind up the company. Paragraphs 164, 165 and 166 of the petition read:

> 164 In the circumstances, it is just and equitable that the company be wound up. The entire business was formed by both TYF and I and originally carried on by THC [ie the first respondent] and I on the basis of mutual trust and confidence. Being a family company, there is an implied understanding that both THC and I and our respective families would participate in the conduct of the business together.
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> 165 THC's actions in the EGM, his attempts to run the business unilaterally without any consideration for the interests or views of my family, as aforementioned leads me to the unavoidable conclusion that the original understanding that our respective families would participate in the conduct of the business together and the trust and confidence which has subsisted between the two families no longer exists.
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> 166 Your Petitioners therefore humbly pray as follows:
>
> (i) That the company may be wound up by this Honourable Court under the provisions of the Companies Act 1965;
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> (ii) That Tan Soo Yan of Ernst & Young be appointed liquidator of the company;
>
> (iii) That the costs of the Petitioners be borne by the Respondents except the ninth Respondent;
>
> (iv) Further or such other orders as shall in the circumstances be deemed fit and proper.

THE FIRST STRIKING OUT APPLICATION

[14] About four months after the presentation of the petition, the respondents filed their first striking out application. It was allowed by Zainun Ali J (as she then was). She held that the petition was an abuse of process of the court and that the petitioners failed to show any just and equitable ground to wind up the company. In her grounds of judgment (see *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2002] 2 MLJ 216) Zainun Ali J said (at p 240):

A This court took into consideration the petition and the affidavits filed therein, and reading them as generously as is possible in the interests of both parties, it seems to this court that in the circumstances, the first petitioner had well and truly put paid to his expectation that equitable considerations would continue to bind the parties.

B In any case, this court is satisfied that *the petition constitutes an abuse of process for the petitioners to have presented a winding up petition on grounds that have been shown to be unsustainable.*

Thus, this court is quite unable to come to the conclusion that the petition discloses any ground for winding up under the just and equitable ground, and in C the circumstances, the petition is struck out with costs.

(Emphasis added.)

D **[15]** The petitioners' appeal to this court against the above decision of Zainun Ali J was allowed and the order to strike out the petition was set aside (see *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492). In delivering the judgment of this court, Richard Malanjum JCA (as he then was) said (at pp 500–502):

E In our view however and subject to our first consideration of whether a striking out application is available or desirable in a company's winding up petition under s 218 of the Act, the main question to address should be whether the learned judge in the court below was correct in striking out the petition on the basis as given.

F *The source of power to strike out the petition*

Before us, learned counsel for the petitioners submitted that this court should 'determine and put to rest the issue of applicability of the Rules of the High Court to winding up proceedings'. Such argument included as in the present case the practice of relying on O 18 r 19 of the RHC to strike out a petition under s 218 G of the Act.

Now, there are strong views expressed by our courts of the undesirability to adopt a striking out procedure in a winding up petition under s 218 of the Act since it could cause further delay rather than expedite the disposal of such matter. In the case of *Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 MLJ H 268, Abdul Hamid Mohamed J (as he then was) expressed his view in this way at p 276:

First, are the RHC 1980 not applicable at all?

The strongest argument against the application of the RHC 1980 is the I provision of O 1 r 2(2) of the RHC 1980 itself.

Besides, the Companies (Winding up) Rules 1972 provides its own scheme of procedure for a s 218 winding up petition which is more simplified and geared for speedy disposal. RHC 1980, for example, provide for appearance (conditional and unconditional), discoveries, interrogatories, judgment in

default of pleading, summary judgment (O 14), striking out of pleadings (O 18 r 19), summons for direction and setting down for trial. Hearing date is only given after the directions made in the summons for direction are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.

The scheme under the Companies (Winding up) Rules 1972 is different. *When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg service, advertisement, compliance with r 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provision for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that is the reason why the Companies (Winding up) Rules 1972 do not provide for such procedures. They are not necessary.*

Furthermore, more often than not, resort to O 18 r 19 of the RHC 1980 in a winding up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time. In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

(See also *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 (CA); *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1)* [1998] 1 MLJ 99 (CA).

We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that *an application made pursuant to O 18 r 19 of the RHC to strike out a petition presented under s 218 of the Act is undesirable and should be discouraged.* In our view, the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter. Of course, we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case, O 18 r 19 could be resorted to. Accordingly, we cannot therefore fully accede to the request of learned counsel for the petitioners. In our view, the background facts of each case are relevant to determine whether a striking out application is appropriate. For instance in the present case, we find that there are matters that cannot be disposed of summarily yet the learned judge in the court below found them as facts. We will elaborate this point later on in this judgment.

(Emphasis added.)

[16] Richard Malanjum JCA also noted that Zainun Ali J made several findings, conclusions and inferences although it was only at an interlocutory stage and was of the view, inter alia, that 'substantially the approach of the court below was to justify a finding by another finding which itself was vague of any evidential basis at the interlocutory stage' (see p 505); he then said (at pp 506–507):

> Accordingly, *it is our view that it was premature or even presumptuous to make the findings, conclusions and inferences as the court below did when it was only at an interlocutory stage.*

In respect of the other point, this is how the learned judge dealt with it:

> The tenacity of the petitioners in wanting a winding up on account of an irretrievable breakdown of 'mutual trust and understanding' between them and the respondents, is diluted, when in the next minute, petitioners were heard to have indicated that they have no problem working together with the respondents after the split.
>
> This court has difficulty in comprehending this rather perverse logic, since this translates into a situation where there could not possibly be such an irretrievable breakdown, if the parties could still work together.
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> This brings the matter to another level and that is such being the case there seems to be a collateral purpose and bad faith in the petitioners' petition.

In short, the learned judge deemed it unnecessary to enquire if there could be any explanation for the apparent contradictions in the stance of the petitioners. In our view, it was an inappropriate approach to adopt. *Surely, the petitioners should be allowed to present their side of the story and to offer an explanation where required.* Indeed, as intimated earlier on, even for the change in the ratio of the shareholdings in the ninth respondent between the brothers, namely the first petitioner and the late Tan Sri Tan Yuet Foh, has differing versions depending on which family is giving. In our view, therefore, the learned judge fell into error on this point.

One other point that is quite disturbing is the purported conclusions or findings that must have been derived from the materials before the learned judge. Obviously, she must have evaluated the several affidavits filed. But that approach would then be tantamount to conducting a trial by affidavits which should not be the case. Indeed, 'in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit' (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212). But having said the foregoing, we are well aware that it is allowable even at an interlocutory stage for the court to examine affidavit evidence and to come to certain finding where 'such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable' (per Mohd Azmi SCJ at p 408 in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). However, it has to be borne in mind as well that the 'principles upon which the court acts in exercising its power under any of the

four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co* [1892] 3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors* [1965] 1 WLR 1238; [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable' (per Mohamed Dzaiddin SCJ (as he then was) at p 43 in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36). Although the foregoing principles were stated in relation to an application pursuant to O 18 r 19 and not in the exercise of common law inherent jurisdiction, in our view there should be no distinction.

There are other subsidiary points raised by the petitioners in this appeal. However, we are of the view that even if we were to deal with them the end results would not be sufficiently material as to alter our decision in this appeal.

For the above reasons, we are inclined to agree with the contention of learned counsel for the petitioners that the decision of the court below should not be allowed to stand and we hereby set it aside. As such, this appeal is allowed with costs here and below to be taxed. Deposit paid for this appeal to be refunded to the petitioners. Subject to further appeal, this matter should be returned to the court below for fixture of trial date as soon as possible before another judge.

(Emphasis added.)

[17] The respondents' application for leave to appeal to the Federal Court against the decision of this court was dismissed with costs. Consequently, pursuant to the order of this court, the petition was transferred for hearing before Zulkefli Ahmad Makinudin J.

KUALA LUMPUR HIGH COURT CIVIL SUIT NO D2–22–1013 OF 2002

[18] It would be appropriate to mention here that about ten months after the presentation of the petition, by writ dated 2 July 2002 (Civil Suit No D2–22–1013 of 2002 and hereafter referred to as 'the said civil suit'), the respondents, including the company, sued the petitioners and claimed against them for, inter alia, the following reliefs:

(a) a declaration that the respondents are collectively the legal and

A beneficial owners of 10,999,807 ordinary shares in the issued and paid up capital of the company free from any claims or encumbrance whatsoever by the petitioners; and

(b) an order that the petitioners by themselves their servants and agents be B restrained and an injunction be issued to restrain the petitioners from asserting publishing uttering or making any statements whatsoever whether expressly or impliedly to the effect or having the meaning whether expressly or impliedly that the petitioners singly or collectively own or control whether legally or beneficially or have any legal or C beneficial interest in any of the issued and paid up shares of the company which are registered in the names of the respondents.

Further, each of the respondents claimed jointly and severally against the petitioners for general damages for loss of reputation and injury and aggravated damages for the malicious act of injuring the credit and reputation D of the respondents and interest and costs.

[19] In their statement of claim the respondents stated that the register of members of the company showed that the respondents are the registered and E beneficial owners of a total of 10,999,807 shares whilst the petitioners are the registered and beneficial owners of a total of 8,849,308 shares. They then claimed as follows:

(a) the petitioners have never challenged nor objected to the exercise of the votes in the company by the respondents in accordance with the F respondents' registered and beneficial shareholdings at any AGM or EGM of the company and have therefore by their actions represented that the registered shareholdings are correct;

(b) the petitioners have never objected to the filing of any of the annual G returns of the company which confirm the registered and beneficial shareholdings of the respondents in the company and have therefore represented that the annual returns are correct;

(c) in particular, the first to the fourth petitioners, as directors of the H company, have a duty under s 354 of the Act to ensure that accurate annual returns are filed to the Companies Commission failing which they would be liable to penalties and therefore the first to the fourth petitioners by approving the filing of the annual returns, as directors, have represented that the registered shareholdings are correct;

I (d) the first to the fourth petitioners have never given any notice pursuant to ss 134 and 135 of the Act to notify the company of any interest in any shares registered in the names of the petitioners and have thereby represented that they do not have any such interests, whether legal or beneficial;

(e) the first petitioner, as chairman of the company usually signs the annual accounts of the company, thereby representing that he is satisfied with the statements as to shareholdings set out therein (see s 171(3) of the Act);

(f) the petitioners have to date filed two winding up petitions, namely Companies Winding Up Petition No D2–28–507 of 2001 (ie, this petition) and Companies Winding Up Petition No D3–28–467 of 2002 seeking the winding up of the company and in neither winding up petition have the petitioners expressly alleged as a ground for winding up of the company that they are the legal and beneficial owners of 50% of the issued and paid up capital of the company.

[20] It is the respondents' contention that by their aforesaid acts and representations the petitioners are therefore estopped from denying that the respondents are the legal and beneficial shareholders of the company as stated in the register of members; notwithstanding the aforesaid representations the petitioners have alleged that the beneficial ownership of the issued and paid up capital of the company is held equally as between the members of the family of the late TYF and the members of the family of the first petitioner.

[21] In the statement of claim the respondents provided the particulars of allegations of equal shareholdings as follows:

(a) by letter dated 28 May 2002 the petitioners through their solicitors alleged that the respondents held 5% or more shares of the company and TCMH on resulting trust for the petitioners, which allegation the respondents deny, and that the respondents and petitioners held equal shareholdings in the company and TCMH;

(b) by a statement issued by solicitors for the first petitioner, which was published in *The Star* newspaper on 30 May 2002, the petitioners confirmed to the public at large that 'the first petitioner's family had served notice on the first respondent's solicitors reserving their rights in relation to a 5% block in the company which the first petitioner claimed he transferred to the late TYF';

(c) the *China Press* on 31 May 2002 published the same statement issued by solicitors for the first petitioner that the first petitioner's family had notified the first respondent of their intention to get back the other 5% stake of the company which was transferred to the late TYF by the first petitioner 'sometime ago'.

[22] It is the respondents' contention that the above allegations of equal shareholdings are deliberate, mischievous, frivolous, vexatious and without basis. Further the aforesaid allegations are in direct contradiction of the

representations made by the directors of the company, who include the first to the fourth petitioners and by making the aforesaid allegations the petitioners have expressly and/or impliedly alleged that the representations, discussed above, are false.

[23] It is the respondents' contention that the allegations in their material and ordinary meaning meant and were understood to convey the meaning that the first to the eighth respondents are subversive, untrustworthy, dishonest, dishonourable or discreditable and/or lacked integrity. The respondents therefore contend that the allegations are false, mischievous, malicious and frivolous and are calculated to cause embarrassment, injury, loss, expense and damage and have lowered the respondents in the estimation of right thinking members of society. Further, the allegations have no basis in law or fact and are defamatory of the respondents, were maliciously made and have caused loss and damage to the respondents.

THE DEFENCE AND COUNTERCLAIM

[24] In their defence, the petitioners pointed out, inter alia, that although the company is named as the ninth plaintiff in this suit, it has not been properly joined as a plaintiff as there has been no decision of any proper organ of the company to retain and authorise its solicitors to institute this suit on behalf of the company; the company has no interest in the suit which involve a dispute amongst its members.

[25] The petitioners contend that not all the shares registered in the names of the first to the eighth respondents are beneficially owned by their respective holders and that 2,150,500 shares in the company currently and collectively registered in the names of the first to the eighth respondents are held on trust for the first petitioner.

[26] The petitioners further contend that the allegations of equal shareholdings are not defamatory in law and denied that such allegations could cause or have caused any loss or damages to any of the respondents, in particular the company. It is also denied that such allegations have been made maliciously or have caused any of the respondents any loss or damage.

[27] In his counterclaim, the first petitioner claimed against the first to the eighth respondents for, inter alia, the following reliefs:

(a) a declaration that 2,150,500 ordinary shares in the company now registered in the names of the first to the eighth respondents are held by them on trust for the first petitioner absolutely;

(b) an order that the first to the eighth respondents shall transfer and cause the said 2,150,500 shares in their respective proportions to be registered in the name of the first petitioner;

(c) an order that the register of members of the company be rectified accordingly;

(d) an account of the profits made under the shares;

(e) an order for inquiry of damages for breach of trust by the first to the eighth respondents or any of them and interest and costs.

[28] The chronology of events furnished by counsel on both sides showed several other applications were filed by the parties. We find no necessity to ventilate most of these applications in this judgment except the ones discussed below.

THE SECOND STRIKING OUT APPLICATION

[29] On 14 July 2004 the respondents filed another application to strike out the petition (encl 146) on the grounds that the petitioners had failed to file an affidavit verifying petition and thereby had breached the Companies (Winding Up) Rules 1972. The petitioners consequently filed an application for extension/abridgment of time (encl 152) to file the affidavit verifying petition. Zulkefli Ahmad Makinudin J fixed both applications for hearing on 9 December 2004.

THE THIRD STRIKING OUT APPLICATION

[30] Meanwhile on 8 October 2004, the respondents filed yet another application (encl 163), ie the subject-matter of this appeal, to strike out the petition premised on the claim by the first petitioner in his counterclaim in the said civil suit for the shares allegedly held on trust by the respondents on trust for the first petitioner absolutely. This third striking out application was fixed for hearing on 12 January 2005.

[31] On 22 February 2005 the learned judge dismissed with costs both the respondents' second striking out application (encl 146) and the petitioners' application for extension/abridgment of time to file an affidavit verifying petition (encl 152).

[32] On 28 December 2005, the learned judge allowed with costs the respondents' third application to strike out the petition. The petitioners appealed. We allowed the appeal and hence, this application by the respondents to the Federal Court for leave to appeal.

[33] In this third application to strike out the petition, the respondents prayed for an order that the petition be struck out under the inherent jurisdiction of the court. The grounds of the application were as follows:

(i) that the petitioners have filed a counterclaim and an affidavit in the said civil suit seeking, inter alia, a declaration that they collectively own approximately 55.417% shares of the company and for rectification of the share register;

(ii) that the substratum of the petitioners' petition is that they are beneficially entitled to 50% of the company and that the company is a '50:50 or equal quasi partnership';

(iii) that the petition is predicated on the basis that the petitioners are not in control of the company as they only claim it to be a '50:50% or equal quasi-partnership' — this is totally inconsistent with the petitioners' claim to be the majority shareholders of the company as per their counterclaim in the said civil suit;

(iv) it is a gross abuse of process for the petitioners to proceed with this winding up petition in view of their contradictory claims made in their reliefs prayed for in their counterclaim in the said civil suit which fundamentally undermines the substratum of their petition; and

(v) that the petition should therefore be struck off as an abuse of the process of the court.

JUDGMENT OF THE HIGH COURT

[34] In his grounds of judgment in granting the order of striking out the petition (see *Tan Kim Hor & Ors v Tang Heng Chew & Ors* [2006] 2 MLJ 324) Zulkefli Ahmad Makinudin J said (at pp 329–331):

> It is my finding in view of the fact that subsequent to the filing of the petition, the petitioners through the said civil suit have made a claim that from the initial incorporation of the company they have actually owned 55.4% of the shares in the company that is, an additional 10.8% more in the share holding, it would be untenable for the petitioners to proceed to pursue this petition on the basis of a claim to an additional 5.4% of the shareholding of the company, and consequently to allege that the relationship between the petitioners and respondents is a '50:50 or equal quasi-partnership' based on the 50% shareholding claim. It would also appear that the petitioners' claim as sworn by them herein to own 50% (or 44.6%) of the shares is entirely inconsistent, incompatible and irreconcilable with the alleged claim to 55.4% of the shares as sworn by the first petitioner in the said civil suit. It is clear that the petitioners' claim in the petition has no foundation in fact, and has not been made in good faith with genuine belief in its merits. The petition filed therefore is an abuse of process and should be struck out (see the case of *Lonrho Plc & Ors v Fayed & Ors (No 5)* [1994] 1 All ER 1881).

It is my view the fact that there are two contradictory claims, both asserted by the petitioners, will be determined by two different courts at two different times as shown in the present case would surely go entirely against the established principles of multiplicity, estoppel or issue estoppel (see the case of *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423). I am also of the view where there is an alternative course or remedy to a winding up of a company, as in the present case that course or remedy ought to be pursued by the petitioners rather than filing a winding up petition against the company (see the case of *Charles Forte Investments Ltd v Amanda* [1964] 1 Ch 240).

It must be stated that to date despite being challenged to do so here, the petitioners have not confirmed whether their purported claim to a higher shareholding is for an additional 5.4% as alleged in the petition or 10.8% as alleged in the said civil suit claim. However, based on the first petitioner's statement on oath in the said civil suit, it appears that the petitioners claim an additional 10.8%, not merely 5.4%. It is my view the shareholding of the petitioners is a material fact and forms the sub stratum of the petitioners' 'entitlement' to present this petition. With the first petitioner's admission, the petitioners are clearly not in a position to sustain this petition since based on their own claim in the said civil suit to own 55.4%, the petitioners would in fact be in the majority. In fact, if the petitioners really own 55.4% of the shares of the company, the petitioners would be 'in control' and there would be no basis for the presentation of a winding up petition since they could simply apply to rectify the register as they have intended to do so in the said civil suit and thereafter convene an EGM to correct any alleged wrongs if they win in the said civil suit (see the case of *Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Ors* [2000] 5 MLJ 529).

In this application of the respondents a poser may be made with so many versions being put forward in respect of the shareholding of the petitioners in the company. We do not know what exactly are the petitioners' contentions and it could be any one of the following:

(a) that they are equal partners in the company based on a 50% shareholding, of which they alleged 5.4% is being held on trust for them as claimed in the petition; or

(b) that they are majority shareholders whereby 10.8% of the shares in the company is being held on trust for them; or

(c) that they are majority shareholders whereby 10.8% of the shares in the company is being held on trust for them; or (sic).

The above three contentions cannot in truth or logic co-exist. Only one can be true. It is my view that the petitioners cannot be allowed to file multiple claims and take multiple stands on oath on the very same issue of their shareholding just to suit the particular purpose of the suit. This court whose equitable jurisdiction is being invoked would not stand by and allow the petitioners to abuse its process in such a manner by swearing the 'truth' of three irreconcilable versions. I find the petitioners in seeking to invoke the 'just and equitable' principle to wind up the company have clearly not come to court with clean hands (see the case of *Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee* [1997] 2 MLJ 190).

[35] In relation to the judgment of this court in *Tan Kim Hor & Ors v Tan Heng Chew & Ors*, which relates to the respondents' first striking out application, the learned judge said (at p 331):

> Learned counsel for the petitioners had submitted that the conduct of the respondents in seeking to strike out this petition for the third time is in itself an abuse of process and the application must fail due to res judicata and/or doctrine of estoppel. It is my considered view that there is no res judicata and/or issue estoppel arising in relation to this present application by the respondents. The Court of Appeal's decision in relation to the first striking out application which allowed the appeal by the petitioners (see the judgment of the Court of Appeal as reported in *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492) did not consider the inconsistent and contradictory averments made by the first petitioner in the said civil suit, of owning 55.4% of the shares in the ninth respondent, its effect on the petition filed herein based on a claim to ownership of 50% of the shares and the petitioner's inequitable and 'unclean hands' conduct on this issue. *The Court of Appeal's decision then was focused on the issue of whether it is a plain and obvious case for striking out or whether the petition is an abuse of process. With respect in my view the said Court of Appeal's decision was therefore premised on different issue and consideration and is not binding herein.* Likewise it is my finding that the Federal Court then did not deal with this new issue when determining the respondent's application whether or not leave ought to be granted against the decision of the Court of Appeal in relation to the first application to strike out.
>
> (Emphasis added.)

THE APPEAL

The petitioners' submission

[36] In canvassing the appeal before us, counsel for the petitioners pointed out the following:

(a) that this third striking out application was based solely on the ground that the first petitioner has made an inconsistent claim as per his counterclaim in the said civil suit that he owns approximately 55.4% shareholding in the company;

(b) that the learned judge erred in law and in fact in striking out the petition summarily without considering the triable issues complained of by the petitioners;

(c) that the learned judge erred in law and in fact in allowing this third application to strike out the petition when he failed to take into consideration of the following:

(i) that the respondents were aware of the said civil suit and the 55.4% claim as per the petitioners' counterclaim as early as 30 August 2002

and failed to raise this issue before this court when canvassing the appeal relating to the first striking out application on 4 September 2002;

(ii) the respondents' application to refer to the 55.4% claim during their subsequent leave application to the Federal Court was dismissed on 29 October 2003;

(iii) the respondents then continued with the petition in the High Court and took active steps in various proceedings including making applications to restrain solicitors from acting for the petitioners, to stay proceedings and to strike out the petition which were as follows:

(aa) on 10 December 2003, the respondents filed an application to restrain the appellants' solicitors from acting;

(bb) on 29 March 2004, the respondents filed their first application for stay of proceedings;

(cc) on 21 April 2004, the respondents filed their second application for stay of proceedings;

(dd) on 17 June 2004, the respondents filed their third application for stay of proceedings;

(ee) on 14 July 2004, the respondents filed their second application to strike out the petition;

(ff) the respondents then raised the issue of the petitioners' 55.4% claim for the first time in their second application for stay of proceedings on 21 April 2004;

(gg) pending disposal of the above applications and having failed in their injunction application to restrain solicitors from acting for the petitioners, the respondents then filed their third striking out application on 8 October 2004.

[37] Counsel for the petitioners then pointed out that in dismissing the respondents' second application for stay of proceedings on 11 March 2005, Zulkefli Ahmad Makinudin J held that the 55.4% claim in the said civil suit is irrelevant to the petition. This was what the learned judge said (appeal record, vol 2, at pp 387–388):

(8) With regard to the defence and counterclaim filed by the petitioners in Suit No D2–22–1013 of 2002 for a declaration that they hold a 55% share in the ninth respondent which is thus said to contradict their statement in this petition stating that they are beneficially entitled to a 50% share in the ninth respondent and that the ninth

respondent is a 50:50 or equal quasi partnership, *it is found that the said defence is irrelevant to the winding up action herein as the basis for the said application for declaration is different as it is related to the respondents' claim against the petitioners for a declaration in respect of the shareholding* and also for defamation. The petitioners on the other hand have made a counterclaim that the said shares were held by the respondents on trust.

(9) The respondents have waived their right for a stay of proceedings in the action herein as they have taken active steps in the petition by filing various applications.

(10) *Any proceedings in this action would not involve other actions filed by the parties as the basis for the petitioners' application to wind up the ninth respondent is that there was a dispute between the members of the ninth respondent and the petitioners leading to a mutual breakdown of trust and confidence between the quasi partners.*

(Emphasis added.)

[38] Counsel submitted that the learned judge erred in law and in fact as follows:

(a) in allowing the respondents' third attempt to strike out the petition when it is trite law that a winding up petition should be adjudicated expeditiously and the respondents should not be allowed to file and prosecute their interlocutory applications in instalments;

(b) in striking out the petition on a single ground that the first petitioner has made an inconsistent claim that he owns approximately 55.4% of the shares in the said civil suit when this claim only constitutes an allegation on the part of the first petitioner in a separate suit founded upon a distinct cause of action;

(c) in making the finding that the petition is an abuse of process when he failed to consider that an inconsistent claim by the first petitioner, if at all, would not render the petition unsustainable warranting it to be struck out; he further failed to consider that it is trite in winding up proceedings that any inconsistent statement should not be resolved at the interlocutory stage where the petitioners had not been given the opportunity to present their case in full and to explain on the inconsistent statement;

(d) in making the finding that the purported inconsistent claim on the shareholding of the company is against the principles of multiplicity, estoppel and issue estoppel without giving any reasons to such a finding;

(e) in making the finding that the petitioners ought to pursue an alternative course or remedy to a winding up of the company when it is clear that the petitioners' cause of action is based on the irretrievable breakdown of mutual trust and confidence between the quasi-partners and the most appropriate remedy is to wind up the company on just and equitable grounds as provided under s 218(1)(i) of the Act;

(f) in making the finding that the inconsistent statement made by the first petitioner in respect of the shareholding of the company forms the substratum of the petitioners' 'entitlement' to present this petition when the substratum of the petition is clearly founded on the quasi-partnership between both families and there is mutual breakdown of trust and confidence between them;

(g) in making the finding that the petitioners have not come to court with clean hands at the interlocutory stage by virtue of the inconsistent claim made by the first petitioner when any conflict of affidavit evidence on the shareholdings of the company should not be resolved at the interlocutory stage of the proceedings;

(h) in making the finding that the first petitioner's 55.4% claim has rendered the petition untenable and unsustainable when the petitioners are claiming in this petition to be a '50:50 or equal quasi-partnership', on the following grounds:

(i) that the learned judge failed to consider the proper concept and principles of quasi-partnership in this family company;

(ii) that equal quasi-partnership does not necessarily depend on percentages of shareholding of any one party; it refers to the basis of mutual understanding and agreement where both families had bound themselves to in the conduct of the affairs of the company;

(iii) the claim in the said civil suit remains to be a claim made by the first petitioner only; it is based on a separate cause of action and is totally independent of this petition; further, the second to the tenth petitioners are not parties to the counterclaim in the said civil suit;

(iv) in winding up proceedings, the only remedy is winding up of the company; the first petitioner is required in law to separately pursue his 55.4% claim by way of the said civil suit for other relief such as seeking the necessary declarations as to shareholdings, among others;

(v) the petitioners' claim in respect of the shareholding of the company remains to be an allegation in the petition and only forms one of the petitioners' many complaints which should be tried at the hearing of the petition;

(vi) any inconsistent statement on the shareholdings made by the

petitioners should be verified at the trial when all affidavits have been filed by both parties and when the parties are at liberty to apply for cross-examination of the deponent(s);

(i) in making the finding that the petition has no foundation in fact and has not been made in good faith with genuine belief in its merits only by virtue of an inconsistent claim made by the first petitioner in the said civil suit; such finding is erroneous as it was made in isolation of the other triable issues raised by the petitioners and it was so made without a proper consideration of the historical background of the Tan Chong family and the basis on which the parties had worked together as equal partners;

(j) when he failed to adhere to the doctrine of stare decisis and further failed to consider the doctrine of res judicata and the doctrine of estoppel in that, among others:

(i) this petition was once struck out by the High Court on 9 October 2001;

(ii) with the exception of the first petitioner's 55.4% claim in the said civil suit, on 29 January 2003, this court had decided that this petition is not a plain and obvious case to be struck out;

(iii) this court held that this petition is sustainable and is not an abuse of the process of the court;

(iv) this court held that the High Court was wrong in striking out the petition summarily and made erroneous findings of fact at an interlocutory stage without a full consideration of the historical background of the quasi partnership between the families and it was also inappropriate to make such findings by resolving conflict of affidavit evidence at an interlocutory stage;

(v) this court further held that the petition ought to be tried by the High Court and had ordered for fixture of a trial date of the petition as soon as possible;

(vi) by virtue of the doctrine of stare decisis, the learned judge is bound by the decision of this court in that the petition is sustainable for trial and it should be fixed for hearing as soon as possible;

(vii) it is not open to the learned judge to again summarily strike out the petition based on a single inconsistent statement when the rest of the grounds are fit and proper to be tried;

(viii) the issue of whether the petition is a sustainable action is also res judicata in that this court had found it fit and proper to be tried by the High Court as soon as possible;

(ix) by virtue of the decision of this court on 29 January 2003 and the respondents' own conduct in this litigation, they should be estopped from prosecuting a third striking out application;

(k) in striking out the petition on the ground of an inconsistent claim of shareholding when it is res judicata and is inconsistent with his earlier finding that the 55.4% claim made by the first petitioner is irrelevant to the petition by his own decision on 11 March 2005 in dismissing the respondents' second application for stay of proceedings with costs;

(l) in failing to consider the ulterior motive and tactical manoeuvre of the respondents in applying to strike out the petition for the third time and their conduct are aimed to delay the proceedings knowing the first petitioner's advanced age;

(m) in failing to consider that this third striking out application was filed with inordinate delay and should be dismissed for the following reasons:

(i) the respondents were aware of the said civil suit and the 55.4% claim as early as 30 August 2002 and failed to raise this issue when the petition was on appeal before this court;

(ii) the respondents' attempt to then raise the 55.4% claim at their leave application before the Federal Court was struck out;

(iii) the third striking out application was only filed on 8 October 2004;

(iv) there is an inordinate and unexplained delay of one year and five months;

(n) in taking into account of irrelevant consideration that it was the petitioners who caused the delay in the hearing of the petition due to their pending leave application to the Federal Court against this court's decision to re-amend the petition; the learned judge failed to consider that it was his decision, which allowed the re-amendments of which has been set aside by this court; the petitioners were seeking in the amendments to restore the learned judge's decision to include the subsequent new events arising from the breakdown of mutual trust and confidence between the parties;

(o) in failing to take into consideration of the 'chronology' of proceedings in this action as it would clearly demonstrate the abusive conduct and the delay on the part of the respondents in taking out their third striking out application;

(p) in making the finding that the petitioners' conduct of affirming two directly contradictory 'truths' on the shareholding of the company was inequitable and 'unclean' conduct which tainted the petition and as such the petition may be struck out at any time; such finding is

erroneous and pre-mature as it was made in isolation of other complaints raised by the petitioners; it was a mere perception on the part of the learned judge without a full and proper consideration of the factual matrix of the petition and the evidence of the first petitioner;

(q) in making a cursory finding that the petitioners have delayed and continue to delay the petition by their application and appeals when a proper appreciation of the 'chronology' of proceedings would reveal otherwise; the petitioners' applications or appeals were limited and were rendered necessary due to the actions taken by the respondents in this petition;

(r) in failing to consider that the respondents' third application to strike out the petition is in itself an abuse of the process of the court and it should be dismissed on this ground alone;

(s) in striking out the petition summarily when he is empowered to order the petition to be amended accordingly at the hearing pursuant to s 221(2)(e) of the Act;

(t) in failing to consider the just and equitable principles in winding up proceedings when he struck out the petition summarily without a full investigation of the triable complaints that led to the breakdown of mutual trust and confidence between the quasi-partners; and

(u) in wrongly exercising his discretion to strike out the petition without a proper appreciation of the realities and essence of quasi-partnership in the company of which the partners have equal say irrespective of their actual shareholdings.

The respondents' submission

[39] Counsel for the respondents submitted that the learned judge has not committed any error of law or fact and had rightfully struck out the petition. He pointed out that the petitioners and the first to the eighth respondents are shareholders of the company and the shareholding in the share register is in the following proportions:

(a) the petitioners — approximately 44.6%;

(b) the first to the eighth respondents — approximately 55.4%.

He also pointed out that in the petition, the petitioners claim to be in a '50:50 or equal quasi-partnership' based on a claim that the petitioners beneficially hold 50% of the shares in the company, ie that the first to the eighth respondents hold 5.4% of the shares on trust for them.

[40] Counsel then pointed out that in the said civil suit, the respondents claimed, inter alia, for a declaration that the first to the eighth respondents are collectively the legal and beneficial owners of the 10,999,807 shares in the company (ie approximately 55.4%) and for an injunction to restrain the petitioners from alleging that they have any legal or beneficial interest in any shares of the company which are registered in the first to eighth respondents' names.

[41] Based on the above premises, counsel argued that the petitioners can no longer sustain their winding up petition and that the same is an abuse of process because the first petitioner has, in the said civil suit, stated on oath, and affirmed that the petitioners' claim in the petition is only an estimation, and that after due investigation, the petitioners are 'actually entitled to claim 10.834% of the total issued and paid up share capital in the ninth plaintiff' and not only the mere 5.4% as claimed in the winding up petition.

[42] Counsel submitted that even though the petitioners hold approximately 44.6% of the shares and the first to the eighth respondents hold 55.4% of the shares as reflected in the share register, the petitioners chose not to petition on this basis, but on the basis of a '50:50 or equal quasi-partnership' claim and to support this they verified on oath that they are in a '50:50 or equal quasi-partnership' by virtue of them allegedly beneficially owning 50% of the shares in the company, ie an extra 5.4% of the shareholding, over and above that reflected in the share register of the company.

[43] Counsel argued that if the petitioners were claiming to be the majority shareholders, winding up under the 'just and equitable' provision would clearly not be an appropriate remedy.

[44] The petitioners had presented their case to this court as one based on a claim that they were '50:50 or equal quasi partners', and in making its decision to allow the petitioners' appeal, this court expressly accepted and highlighted that this was indeed the petitioners' claim.

[45] The effect of the affirmed statement in the said civil suit that the petitioners own 55.4% of the shares of the company is that for the petitioners to continue with the present petition, under the 'just and equitable' head, which is based on a claim that the petitioners own 50% would be a gross abuse of process and the petition should be struck off. It is untenable for the petitioners to continue to pursue this on the basis of a claim to an additional 5.4% of the shareholding of the company, which they themselves have sworn no longer exists. The allegation that the relationship between the petitioners

A and the respondents is a '50:50 or equal quasi-partnership' based on the 50% shareholding claim can no longer exist as claimed in the petition.

B **[46]** The shareholding of the petitioners is a material fact and forms the substratum of the petitioners' 'entitlement' to present the petition; with the first petitioner's admission, the petitioners are clearly not in a position to sustain the petition since based on their own claim in the said civil suit to own 55.4%, the petitioners would in fact be in the majority and would be 'in control'. Thus, there is therefore no basis for the presentation of a winding up C petition. They could simply apply to rectify the register, as they have done in the said civil suit, and thereafter convene an EGM to correct any alleged wrongs if they win.

D **[47]** There being no basis to present the petition based on a '50:50 or equal quasi-partnership' basis, the petition is an abuse of the court process as the claim to 50% of the shares with only 5.4% held on trust was clearly formulated specifically to enable a winding up petition to be presented in the manner set out in the petition; this was so that the petitioners, with a registered shareholding of 44.6% could file a petition claiming to be '50:50 E or partners', and to allege oppression, so called irreversible breakdown and deadlock. If the petitioners had claimed to be 55.4% shareholders in the petition then the petition would clearly have been unsustainable.

F **[48]** Counsel then summarised the 'many versions' that were being contended by the petitioners vide the petition, their counterclaim in the said civil suit and their affidavits filed in these proceedings to be as follows:

(a) that they are equal partners in the company based on 50% shareholding, of which they allege 5.4% is being held on trust for them G as claimed in the petition;

(b) that they are majority shareholders whereby 10.8% of the shares in the company is being held on trust for them; and

H (c) that they are minority shareholders holding approximately 44.6% of the shares in the company.

[49] Counsel argued that these three contentions cannot in truth or logic co-exist and that only one can be true. The petitioners cannot be allowed to I file multiple claims and take multiple stands on oath on the very same issue of their shareholding just to suit the particular purpose of the suit. He then submitted that the court, whose equitable jurisdiction is being invoked, ought not stand by and allow the petitioners to abuse its process in such a manner by swearing the 'truth' of three irreconcilable versions.

[50] Counsel concluded his arguments as follows:

(a) that the petitioners have acted inequitably and not come to court with clean hands;

(b) that the petitioners themselves are the defendants in the said civil suit and should know the contents of their own counterclaim and affidavits sworn on their behalf; and

(c) that they and their solicitors have a duty to the court to inform their solicitors and the court in the petition that they have alleged and sworn to a fundamentally different position in the said civil suit once the same has been discovered.

Upon realising that they now claim 55.4% in the said civil suit, the petitioners should have immediately informed the winding up court and this court of this fact which would have serious repercussions on the petition and withdraw their petition. To continue relying on the sworn claim to own 50%, when they have withdrawn it in the said civil suit, is a clear abuse of process.

JUDGMENT OF THIS COURT

[51] Section 218 of the Act provide the circumstances in which a company may be wound up by court; it reads:

(1) The Court may order the winding up if —

(i) the Court is of opinion that it is just and equitable that the company be wound up;

[52] We had allowed this appeal and set aside the striking out order given by the learned judge as we are of the view that averments made in a petition for a winding up under s 218(1)(i) of the Act has to be investigated fully by the court and this can only be carried out during the hearing of the petition. The words 'just and equitable' appearing in s 218(1)(i) encompass a very wide concept and the court should not summarily strike out such a petition based on that subsection without conducting a full hearing. At a full hearing, the petitioner will have to show to the court that the company should no longer be allowed to continue and that it should be wound up. We do not think a judge, based upon affidavits filed in a motion to strike out such a petition and averments made in pleadings filed in a related writ action and involving the same parties, can strike out the petition simply because he is of the view that the petitioner has an alternative remedy.

[53] The petitioners premised their petition on the basis that they are the

minority shareholders. Section 158 of the Act provides 'every company shall keep a register of its members and enter therein the particulars of its members and in the case of a company having a share capital a statement of the shares held by each member, the date at which the name of each person was entered in the register as a member, the date of every allotment of shares to members and the number of shares comprised in each allotment'. Section 158(4) of the Act reads:

> The register of members shall be prima facie evidence of any matters inserted therein as required or authorised by this Act.

[54] In the instant appeal, it is not disputed that petitioners hold 44.6% of the shares in the company and that the respondents hold 55.4% of the shares as reflected in the register of members of the company. The petitioners are not claiming vide the petition that they are the majority shareholders as suggested by counsel for the respondents. The first petitioner has stated in the petition that the company was incorporated with the first petitioner's family and TYF's family each holding a 50%–50% stake in the company. He further stated that he was persuaded by the late TYF to transfer 5% of his stake to the latter 'for image purposes' and it was agreed that 'the 5% transfer would only confer on TYF 5% more of any dividends, and not any other rights attached to those shares'. He has also stated that he has yet to be paid for the transfer of the said 5%. What is clear from the petition is that the petitioners based the petition not on a claim for the 5% stake but on the basis that the entire business was formed by both the first petitioner and the late TYF and that it was originally carried on by the first petitioner and the first respondent 'on the basis of mutual trust and confidence' and being a family company, there is an implied understanding that both the first petitioner and the first respondent and their respective families 'would participate in the conduct of the business together'.

[55] The petition was based on the first respondent's actions in the EGM held on 11 September 1999 and his attempts to run the business unilaterally without any consideration for the interests or views of the first petitioner's family and that led the first petitioner 'to the unavoidable conclusion that the original understanding that our respective families would participate in the conduct of the business together and the trust and confidence which has subsisted between the two families no longer exists'. This is the basis upon which the petitioners are seeking to wind up the company on the just and equitable ground and not for the return of the 5% stake. That being the position, we cannot see why the petition to wind up the company would not be an appropriate remedy as suggested by counsel for the respondents. A case on point would be *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, a decision of the Court of Appeal, England. The facts showed that Weinberg, the

petitioner and one Louis Rothman incorporated a company to acquire, amalgamate and carry on two businesses formerly separately carried on by them respectively. It was arranged between the parties that they should have equal rights of management and voting powers in the company. They were the only directors. Differences then arose between the parties. Subsequently, it appears that neither of them will speak to the other. If any business has to be transacted by the company, some third person has to be present to whom each of these directors can express his views. Astbury J decided that it was just and equitable that the company be wound up. In dismissing the appeal from the decision of Astbury J, Warrington LJ said (at pp 434–435):

> Under those circumstances Weinberg applies to the court for an order to wind up the company. Rothman opposes it. The company does not appear as such because there are no means by which instructions can be given to anybody to appear on its own behalf. In substance, therefore, it seems to me these two people are really partners. It is true they are carrying on the business by means of the machinery of a limited company, but in substance they are partners; the litigation in substance is an action for dissolution of the partnership, and I think we should be unduly bound by matters of form if we treated either the relations between them as other than that of partners or the litigation as other than an action brought by one for the dissolution of the partnership against the other; but one result which of course follows from the fact that there is this entity called a company is that, in order to obtain what is equivalent to a dissolution of the partnership, the machinery for winding up has to be resorted to. Now, if this had been an ordinary partnership and an action had been brought for dissolution, it seems to me quite clear that the plaintiff, who is the petitioner in this case, would have had sufficient ground for a dissolution of partnership according to the ordinary principle by which the court is guided in such matters. Then s 129 of the Companies (Consolidation) Act, 1908, which defines the grounds upon which the court in the case of a company can make an order for winding up, includes the provision that such an order may be made if the court is of opinion that it is just and equitable that the company should be wound up. At one time it was thought, and there was judicial opinion in support of it, that in order to bring the case within that provision of the Companies Act it must be shown to be ejusdem generis with a certain number of other cases which are specified in a previous part of the section; but that opinion has long been abandoned, and the court has in more cases than one expressed the view that a company may be wound up if, for example, the state of things is such that what may be called a deadlock has been arrived at in the management of the business of the company. I am prepared to say that in a case like the present, where there are only two persons interested, where there are no shareholders other than those two, where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the quarrels of the two directors and shareholders, the company ought to be wound up if there exists such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other. Such ground exists in the present case. I think, therefore, that it is just and equitable that the company should be wound up.

[56] As discussed earlier, this court had in *Tan Kim Hor & Ors v Tan Heng Chew & Ors*, unanimously held, inter alia, that:

(a) an application to strike out a petition presented under s 218 of the Act was undesirable and should be discouraged; it would only delay adjudication of the matter;

(b) that Zainon Ali J was wrong in summarily striking out the petition by making findings of fact at an interlocutory stage; one such erroneous and premature finding was on the disputed issue of beneficial shareholdings between the parties;

(c) that Zainon Ali J was also wrong in conducting a trial by affidavits;

(d) that Zainon Ali J failed to appreciate the true nature of the company and the just and equitable principle on the facts of the Tan Chong family business; and

(e) that the petition is sustainable and is triable.

[57] In the instant appeal before us, Zulkefli Ahmad Makinudin J had allowed the application to strike out the petition on, inter alia, the following grounds:

(a) since, subsequent to the filing of the petition, the petitioners through the said civil suit have made a claim that from the initial incorporation of the company they have actually owned 55.4% of the shares in the company, ie an additional 10.8% more in the share holding, it would be untenable for the petitioners to proceed to pursue this petition on the basis of a claim to an additional 5.4% of the shareholding of the company and consequently to allege that the relationship between the petitioners and respondents is a '50:50 or equal quasi-partnership' based on the 50% shareholding claim;

(b) that the petitioners' claim that they own 50% of the shares of the company is entirely inconsistent, incompatible and irreconcilable with the alleged claim to 55.4% of the shares as sworn by the first petitioner in the said civil suit;

(c) that it is clear that the petitioners' claim in the petition has no foundation in fact, and has not been made in good faith with genuine belief in its merits;

(d) where there is an alternative course or remedy to a winding up of a company, as in the present case, that course or remedy ought to be pursued by the petitioners rather than filing a winding up petition against the company;

(e) the petitioners have not confirmed whether their purported claim to a higher shareholding is for an additional 5.4% as alleged in the petition

or 10.8% as alleged in the said civil suit claim — based on the first petitioner's statement on oath in the said civil suit, it appears that the petitioners claim an additional 10.8% and not merely 5.4%; thus, with the first petitioner's 'admission', the petitioners are clearly not in a position to sustain this petition since based on their own claim in the said civil suit to own 55.4%, the petitioners would in fact be in the majority and in fact, if the petitioners really own 55.4% of the shares of the company, the petitioners would be 'in control' and there would be no basis for the presentation of a winding up petition since they could simply apply to rectify the register as they have intended to do so in the said civil suit and thereafter convene an EGM to correct any alleged wrongs if they win in the said civil suit;

(f) the petitioners cannot be allowed to file multiple claims and take multiple stands on oath on the very same issue of their shareholding just to suit the particular purpose of the suit and the court, whose equitable jurisdiction is being invoked, would not stand by and allow the petitioners to abuse its process in such a manner; and

(g) the petitioners, in seeking to invoke the 'just and equitable' principle to wind up the company, have clearly not come to court with clean hands.

[58] In dealing with the striking out application (ie encl 163), the learned judge, at the behest of counsel for the respondents, had also dealt with the pleadings filed in the said civil suit. We are of the view that the petitioners' 55.4% claim of the shares of the company vide the first petitioner's counterclaim in the said civil suit is irrelevant and immaterial to the petition. The petitioners' counterclaim in the said civil suit is for a declaration that a total of 2,150,500 shares in the company currently and collectively registered in the names of the first to the eighth respondents are held on trust for the first petitioner. He will have to prove that claim at the trial of the said civil suit.

[59] What the learned judge has to consider when dealing with the striking out application is whether the just and equitable principle is sustainable based upon the averments found in the petition. He cannot conduct a trial by affidavits and take into account irrelevant considerations such as alternative remedies. The claim for the said 2,150,500 shares in the company in the first petitioner's counterclaim does not form the basis for the petition. The basis for the petition is based on the undisputed facts of the quasi-partnership of the Tan Chong business as founded by the first petitioner and his brother, viz, the late TYF.

[60] We are of the view that the learned judge failed to appreciate the true nature of the company and the just and equitable principle in striking out the

petition without hearing it on its merits. The House of Lords in *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 held that while the 'just and equitable' provision (as provided for in s 222(f) of the English Companies Act 1948 and which is in pari materia with s 218(1)(i) of the Act) did not entitle a party to disregard the obligations which he assumed by entering a company, it enable the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way.

[61] The facts of *Ebrahimi v Westbourne Galleries Ltd* showed that since about 1945 the appellant and *N* had carried on in partnership a business as carpet dealers. As partners they had an equal share in the management and profits. In 1958 they formed a company to take over the business. The appellant and *N* were the signatories to the company's memorandum and were appointed its first directors. Of the issued share capital of 1,000 £1 shares, 500 were issued to each of the subscribers. Under the articles shares could not be transferred without the directors' consent. Soon after the company's formation *N*'s son, *G*, was appointed a director and each of the two original shareholders transferred to him 100 shares. The company made good profits, all of which were distributed by way of directors' remuneration. No dividends were ever paid. Differences arose between the appellant and *N*, with whom *G* sided, about the running of the business. In August 1969, at a general meeting, *N* and *G*, by means of an ordinary resolution which was legally effective under s 184 of the Companies Act 1948 and the company's articles, removed the appellant from the office of director and thereafter excluded him from any share in the conduct of the company's business. The appellant petitioned for an order under s 210 of the 1948 Act that *N* and *G* purchase his shares in the company and, in the alternative, for an order under s 222(f) of the 1948 Act that the company be wound up on the ground that it was just and equitable to do so. The trial judge rejected most of the allegations of oppression and misconduct made by the appellant and found that such complaint as he had made out did not amount to such a course of oppressive conduct as to justify an order under s 210. He held however that, although the appellant had been lawfully removed from office, *N* and *G* had done him a wrong in the sense that it was an abuse of power and a breach of the good faith that partners owed to each other to exclude one of them from all participation in the business on which they had embarked on the basis that all should participate in its management. He held therefore that a case had been made out for a winding-up order under s 222(f). The Court of Appeal allowed an appeal by *N* and *G* against the order holding that the appellant had failed to establish, as was incumbent on him, that the action of *N* and *G* in removing him, had not been taken bona fide in the interest of the company. The appellant appealed to the House of Lords. In allowing the appeal Lord Wilberforce said (at pp 379–380):

My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to 'quasi-partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic,

is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.

[62] In the instant appeal, we find it difficult to comprehend why the learned judge, having ruled on 11 March 2005 on the respondents' first stay application that the defence and counterclaim filed by the first petitioner in the said civil suit is irrelevant to the winding up action as the basis for the petition was that there was a dispute between the members of the company 'leading to a mutual breakdown of trust and confidence between quasi partners', would about nine months later strike out the petition on the ground of the 55% claim made by the first petitioner in the said civil suit.

[63] We are of the unanimous view that the learned judge was wrong in summarily striking out the petition, which was for the second time, in the same winding up proceedings. The application to strike out was clearly an abuse of the process of the court. This was clearly not a plain and obvious case warranting striking out. This court had already held that an application to strike out the petition presented under s 218(1)(i) of the Act was undesirable and should be discouraged as it would only delay adjudication of the matter (see *Tan Kim Hor & Ors v Tan Heng Chew & Ors*). The learned judge has failed to appreciate the true nature of the company and the just and equitable principle on the facts of the Tan Chong family business. The petition is clearly sustainable and is triable and the main issue at the hearing of the petition would be whether there are adequate grounds to order a winding up of the company based on the just and equitable ground and on a mutual breakdown in trust and confidence between the petitioners and the respondents as members of the Tan Chong family based upon the facts pleaded in the petition. This is what the trial judge at the hearing of the petition has to decide. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power and it should be exercised with the utmost caution. A case on point is *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347. In that case, Seah FJ in delivering the judgment of the court said (at p 350):

> In our judgment, this is not a proper time to consider these rival submissions when the inherent jurisdiction of the court is invoked to strike out a writ and/or a statement of claim on the ground that it was an abuse of the process of the court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution (per Lord Diplock in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1. In *Lawrance v Norreys* (1890) 15 App Cas 210 at p 219 Lord Herschell said words to the same effect that 'It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in

very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved'. In our opinion, the question posed before the learned judge ought to be decided at the trial.

[64] The third striking out application of the petition (encl 163) is clearly an abuse of process of the court. In relation to the flurry of applications to strike out the petition including the applications for stay at each stage of the proceedings filed by the respondents, we would refer to *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187; [2001] 3 AMR 2893. In delivering the decision of this court, Abdul Hamid Mohamad JCA (as he then was) said (at pp 203–204, MLJ); (at pp 2915–2916, AMR):

I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA. I agree entirely with his views. However, I only wish to add a few words to further emphasise my unhappiness (and his too) about the way winding-up petitions are often conducted. Indeed what I am saying here is no more that what I have said on at least four occasions when I was sitting in the High Court. Reference can be made to *Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 MLJ 268; [1999] 4 AMR 4374, *Antara Elektrik Sdn Bhd v Bell & Order Bhd* [2000] 6 MLJ 385, *Sun Microsystems (M) Sdn Bhd v KS Eminent Systems Sdn Bhd* [2000] 4 MLJ 565; [2000] 4 AMR 4236 and recently *SP Setia Bhd v Gasing Heights Sdn Bhd* [2001] 5 MLJ 117.

As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications. That would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under r 32 of the Companies (Winding-up) Rules 1972 was appealed against and when the appeal was dismissed, the respondent further appealed to the Supreme Court — see *Asia Commercial Finance (M) Berhad v Lum Choon Realty Sdn Bhd*. Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. The effect is that the hearing and disposal of the petition is delayed.

One of the most abused procedures adopted in winding up proceedings is the application to strike out the petition under O 18 r 19 of the RHC 1980 and/or the inherent jurisdiction of the court.

[65] We would agree with the submission of counsel for the appellants that the learned judge went into serious error in hearing and allowing the third striking out application in that he failed to appreciate that the just and equitable principle can only be considered at a full hearing of the petition.

The counterclaim of the first petitioner in the said civil suit for a declaration that 2,150,500 ordinary shares in the company vis-a-vis the current registered shareholdings of the petitioners is not central to the determination of the petition. We are of the view the claim for such a declaration was but a 'red herring' thrown in by the respondents as far as this application to strike out the petition is concerned. That prayer for such a declaration has yet to be adjudicated upon in he said civil suit. As such we cannot fathom how the learned judge can come to the conclusion that the petitioners came to court with unclean hands when they presented the petition and that the issue of estoppel can be raised against them under these circumstances.

[66] A judge hearing a petition such as this must first find whether there has been a breakdown of mutual trust and confidence between the parties in what is essentially a quasi partnership and consequently decide whether there are just and equitable grounds to wind up the company. The learned judge was clearly wrong in making the findings, conclusions and inferences that he did at an interlocutory stage. We would say that it was a wrongful exercise of discretion. The petition is obviously sustainable and it must be remitted to the High Court for trial.

[67] For the reasons aforesaid, we had allowed this appeal with costs here and ordered that the deposit be refunded to the petitioners, ie the appellants to the account of taxed costs.

Appeal allowed with costs.

Reported by Andrew Christopher Simon